So far as count one is concerned, the Crown case required an adverse inference to be drawn from the tapes. So far as count two is concerned, the Crown case again required an adverse inference to be drawn from the tapes. Now if the tapes are wholly equivocal as to when querist became aware of the facts he so lightheartedly recounted with what some might regard as misplaced joviality - and, in my opinion, they are - it is a classic case for the application of the principle which governs cases of circumstantial evidence, recently examined by the High Court in *Knight*, supra. That case concerned proof of the state of mind of a prisoner standing trial for attempted murder when the relevant shot was fired. The majority (Mason CJ, Dawson and Toohy JJ, at pp 502-3 say: "The state of mind of the appellant was

necessarily a matter of inference from other facts found by the jury. In those circumstances, the reasoning process which must be employed if the onus of proof beyond reasonable doubt is to remain upon the prosecution is well recognised. As Dixon J said in *Martin v. Osborne* 1936 (55 CLR 367, 375):

> 'If an issue is to be proved by circumstantial evidence, facts subsidiary to or connected with the main fact must be established from which the conclusion follows as a rational inference. In the inculpation of an accused person the evidentiary circumstances must bear no other reasonable explanation.'"

And at p.503 they cite a further passage from the same judgment of Dixon J:

> "This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed."

The fact proved is querist's awareness of a situation which involved the state of mind of Flannery and of the police in late January 1984 and prior to his certificate. The fact to be proved is that he became aware of the situation prior to the giving of the certificate. Without more, no such conclusion could rationally be drawn.

Is there more? The learned judge in summing up told the jury that Duff had more than a casual acquaintance with querist and went on, "We are not to know what the basis of that friendship was. We do not know why people in our community sometimes try to cultivate senior police officers, but it happens."

Nothing briefed to me shows that there was a friendship at all. The last sentence is plainly a suggestion that querist was at least likely to be one of the people in the community who improperly cultivate senior police officers. If there is no basis for that it is a highly prejudicial slur by the presiding judge. It did not end there. The

learned judge went on to refer to the Crown's assertion that there had been demonstrated "just how that sort of association can sometimes lead to criminal activity". The learned judge proceeds to remind the jury that Duff, although not officially involved in the harassment complaint, went to Castle Hill police station because obviously he was concerned "as a friend of the accused that everything was being done that could be done to locate Evans". The suggestion, whether it emanates from the Crown or not, seems to have been that it was corrupt or improper for Duff to have interested himself in the matter of the harassment by Evans, if Evans it was. For my part I cannot see how that can be suggested, but of course Duff and McNamara had an interest of their own in ensuring that querist whom, on his account of things, they had duped, did not become frustrated and try to say too much. It is possible that querist said something in his evidence to the Medical Board which might lend some colour to these directions to the jury and if so I should be told. I return to the legal aspect of the summing up.

The summing up was, with respect, quite unsatisfactory for a case which was essentially circumstantial. One would have expected a direction in conformity with, say, *Peacock* (1911) 13 CLR 619, an indication of the critical fact or facts to be proved by inference from the facts proved and an indication of the competing hypotheses. Instead there was no reference to principle until the summing up was almost completed, when the jury is given a final and perfunctory direction in the following language:

> "There is a further direction of law I have to give you and that is that if there are two competing theories, one of which is consistent with the accused's

> innocence, then you must give him the benefit of the doubt. That does not mean to say that just because you have heard some explanation or two other explanations you have to weigh the effect of those explanations. Is it a valid theory? Is it one that is plausible in all the circumstances? Because it is all the evidence that you have to consider before you in deciding whether you find one way or the other."

The more usual direction is that referred to in *Knight* at p.205, namely, that the jury should only find by inference an element of the offence charged if there are no other inference or inferences which are favourable to the defendant reasonably open on the facts. However as in *Knight* so here, the question is whether the jury, acting reasonably, could have rejected as a rational inference the possibility that querist had no guilty knowledge when he treated Flannery on 26/1/84 and admitted him to hospital on 28/1/84.

I turn now to the question of possible relief. The new Part 13A of the Crimes Act replaces not only s.475 of that Act but also s.56(a) of the Criminal Appeal Act 1912. It applies to past convictions: s.12 of the amending Act (No. 64 of 1993) unless a matter was pending under s.475 or s.12(a) as the case may be. It would seem that querist has no matter, which is undefined, so pending. Division 2 provides for a petition to be made to the Governor for a review or the exercise of the pardoning power: s.474B, whereupon the Governor may direct an inquiry, the Minister may refer the whole case to the Court of Criminal Appeal to be dealt with as an appeal, or the Minister may request the opinion of the Court of Criminal Appeal on any point: s.474C(1). However before any action is taken under s.474C(1) there must be a doubt or question as to the convicted person's guilt: s.474C(2) and if the same

matter has been dealt with under s.475 the petition need not be dealt with unless the Minister is satisfied that special facts or circumstances justify the taking of further action: s.474C(3).

Division 3 provides for an application for an inquiry to the Supreme Court: s.474D(1). An inquiry may be directed only if there is a doubt or question as to guilt, as to any mitigating circumstances in the case or any part of the evidence: s.474E(2). There is the same discretion as under s.474C(3) if the same matter has been dealt with under s.475.

The distinction between the two procedures is that the petition under Division 2 can get the case straight to the Court of Criminal Appeal under s.474C(1)(b). In querist's situation this has much to recommend it. The relevant material has been collected and put before the Chief Justice, Finlay J, and a succession of Attorneys-General. There seems to be no need for further inquiry which may be time-consuming and costly. The only witnesses who have not been submitted to cross-examination are Professor Crank, Mrs Hall, Vandimeer and O'Brien. No doubt the Court of Criminal Appeal could order their cross-examination. Such a course would have the advantage of providing finality for both querist and the Crown.

Finally, the question must be asked what the special facts and circumstances are that justify the taking of further action. I would summarise them as follows:

(1) Querist faced the jury as a professional man well known to be offside with his profession and a man with a flamboyant lifestyle. Such men tend to receive little sympathy from judge or jury and it is essential to a fair trial that in such cases it be conducted strictly according to law.

(2) The trial was marred by errors of law in that -

(i) the act required to be proved as the act solicited was not confined to assault;

(ii) the direction in relation to circumstantial evidence was not adequate;

(iii) the jury was invited to draw inferences of guilt from ambiguous words without a warning that they could only do so if those inferences were the only rational inferences which could be drawn.

(3) It was not open to the jury to draw inferences of guilt from the telephone conversations of 3/3/84 and 15/4/84.

(4) There was no friendship between querist and Duff and no evidence of any relationship other than that of a medical practitioner and patient. The summing up of the learned judge when he told the jury that Duff had more than a casual relationship with querist was in error.

(5) The only review at judicial level of the new evidence has been that of Finlay J, who, with respect, misconceived his function. The evidence of Keane, if believed, would have shed new light on the case. Any one who thought it capable of belief would have felt the requisite "unease" or "sense of disquiet": *Varley* 1987 (8 NSW LR 30, 35, 48). In rejecting it out of hand his Honour was really requiring doubt as to querist's guilt to be shown to his own satisfaction which is, with respect, erroneous: *Varley* at 48. As to Mrs Hall there is no indication that his Honour recognised the

significance of her evidence, namely, (a) that to all appearances Flannery came in the ordinary way to the surgery (although she was surprised that police had recommended it); and (b) that the critical approach by querist to Flannery on 3/3/84 was immediately followed by querist calling for Duff's card and putting the matter in his hands. His Honour's suggestion that her evidence should have been available at the trial overlooks the fact that evidence need not be fresh evidence for the purpose of the doubt required by s.475 and now ss474C(2) and 474E(2) See e.g. *Varley* at p.45.

(5) Querist has long since served his sentences. This however is no impediment. Section 475, the precursor of the present legislation, was designed to enable a man to clear his name: *White* 1906 (4 CLR 152, 165) per O'Connor J. This is of especial importance to querist who is not being permitted to practise his profession while the convictions stand.

In conclusion I am of the opinion that there are good grounds for a petition for a review of querist's convictions or the exercise of the Governor's pardoning power, under s.474B of the Crimes Act 1900, to the end that His Excellency may be pleased to exercise the pardoning power or alternatively the Honourable the Minister may refer the whole case to the Court of Criminal Appeal to be dealt with as an appeal.

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Former Queensland Supreme Court Justice 1993